



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 22, 2005

Mr. David Hanson
Schwartz & Eichelbaum, P.C.
4201 W. Parmer Lane, Suite A-100
Austin, Texas 78727

OR2005-05535

Dear Mr. Hanson:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 226554.

The Mission Consolidated Independent School District (the "district"), which you represent, received a request for all, written or audio recorded, statements regarding the requestor's termination. You state that the requestor, through her attorney, modified her request twice, once by agreeing to accept written transcripts of the audio recordings in lieu of the actual audio recordings and then again by verbally re-requesting the audio tapes. You claim that the highlighted portions of the submitted information, as well as the audio compact disc are excepted from disclosure under sections 552.101 and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the common-law right of privacy, which protects information that is 1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and 2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual

harassment in an employment context. In that case, the court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, but held that the identities of the victims and witnesses to the alleged sexual harassment were protected by the common-law privacy doctrine. *Id* at 525.

You claim that the submitted information relates to a sexual harassment investigation and thus the identifying information of the victim, which you have highlighted, should be withheld. You state that the submitted information constitutes a sexual harassment investigation because it pertains to unwelcome verbal conduct of a sexual nature. You have cited us to two Supreme Court cases that you claim support your position. In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), the plaintiff alleged that her former employer had created an “abusive work environment” by repeatedly insulting her because of her gender and making her the target of unwanted sexual innuendos. In *Meritor Savings Bank, FSB, v. Vinson*, 477 U.S. 57 (1986), the plaintiff sued her former employer for sexual harassment claiming that, as a condition of continued employment, her supervisor repeatedly made demands for sexual favors and sexually assaulted her on several occasions. In this instance, an individual reported an alleged conversation between herself and the requestor regarding a suspected relationship between the individual and the requestor’s fiancé. After reviewing the cited cases and your arguments, we find that you have failed to explain how the reported incident is a claim of sexual harassment. *See* 29 CFR § 1604.11(a) (2005) (defining sexual harassment as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term or condition of employment, (2) submission to or rejection of such conduct is used as a basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating a intimidating, hostile, or offensive working environment). Accordingly, the highlighted information may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy and *Ellen*.

Next, you claim that the highlighted individual is an informer within the meaning of section 552.135 of the Government Code, which provides:

(a) “Informer” means a student or former student or an employee or former employee of a school district who has furnished a report of another person’s or persons’ possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer’s name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of

the student or former student consents to disclosure of the student's or former student's name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

(d) Information excepted under Subsection (b) may be made available to a law enforcement agency or prosecutor for official purposes of the agency or prosecutor upon proper request made in compliance with applicable law and procedure.

(e) This section does not infringe on or impair the confidentiality of information considered to be confidential by law, whether it be constitutional, statutory, or by judicial decision, including information excepted from the requirements of Section 552.021.

Gov't Code § 552.135. Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under that exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See* Gov't Code § 552.301(e)(1)(A). You state that the highlighted individual furnished a report of another person's possible violation of section 22.011 of the Texas Labor Code and section 2000e-2(a) of title 42 of the United States Code. *See* Texas Labor Code § 22.011 (2005) (defining employment discrimination for participating in emergency evacuation) and 42 U.S.C. 2000e-2(a) (2005) (listing unlawful employment practices). However, after reviewing the submitted information and your arguments, we find that you have not explained how the furnished report is a report of another person's possible violation of section 22.011 of the Texas Labor Code or section 2000e-2(a) of title 42 of the United States Code. Accordingly, the district may not withhold the highlighted information under section 552.135 of the Government Code.

We note that portions of the submitted information are confidential under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is received. *See* Open Records Decision No. 530 at 5 (1989). Thus, if the employee whose information is at issue timely elected to keep her personal information confidential, you must withhold this information, which we have marked, under section 552.117(a)(1) of the Government

Code. Additionally, the district must withhold this information from the submitted audio compact disc. However, if the employee did not make a timely election, this information must be released.

Finally, we note that some of the submitted information is confidential under section 552.101 of the Government Code in conjunction with common-law privacy. We have marked the information that must be withheld under section 552.101 in conjunction with common-law privacy. Additionally, the district must withhold this information from the submitted audio compact disc. As to the remaining information, we find that, even if this information could be considered highly intimate or embarrassing, it is of legitimate public concern. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow), 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job). Accordingly, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

In summary, if the employee whose information is at issue timely elected to keep her personal information confidential, you must withhold the information we marked in the written transcripts as well as the same information on the audio compact disc under section 552.117(a)(1) of the Government Code. If the employee did not make a timely election, the personal information must be released. The district must withhold the information we marked in the written transcripts as well as the same information on the audio compact disc under section 552.101 of the Government Code in conjunction with common-law privacy. The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), ©). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the

statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jaclyn N. Thompson
Assistant Attorney General
Open Records Division

JNT/krl

Ref: ID# 226554

Enc. Submitted documents

c: Ms. Marianne Dwight
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(w/o enclosures)